

Privileged Communications (Competency & Compellability)ASR

- *Competency of Witnesses*
- Under section 118 all persons are competent to testify unless they are incapable of giving evidence or understanding the questions put to them because of *tender years, extreme old age, disease or any other cause* of the same kind.
- Whether a witness is competent, depends on his *capacity to understand the questions put to him and the capacity to give rational answers thereto.*

Preliminary Examination to test the capacity of a child witness

- Before the evidence of child witness is recorded, the court must by preliminary examination test his capacity to understand and give rational answers and must form an opinion as to the competency of the witness.
- A similar examination may be conducted with respect to other witnesses whose competency is in question because of **extreme old age, disease or any other cause** of the same kind.

Compellability

- In general a witness who is competent may be compellable.
- There are exceptional cases , where a witness may be competent and yet not compellable. (**Foreign ambassadors and sovereigns** cannot be compelled by a court to appear before it to give evidence.)
- Again a **witness is competent and also may be compellable yet the law may not force him** to answer certain questions. **This is called restricted compellability or privilege.**

PRIVILEGED COMMUNICATIONS (Competency & Compellability)ASR

PRIVILEGED WITNESSES

- On grounds of public policy certain witnesses cannot be compelled to answer certain questions in a Court of law though they are competent witnesses. Such witnesses are called privileged witnesses. Privileged witnesses are competent witnesses but not compellable to answer certain questions.

Matters relating to conduct and knowledge of judge

A Judge or a Magistrate cannot be compelled to answer questions relating to

(a) his own conduct in court as *a Judge or Magistrate*

(b) anything which comes to his notice in court *as a Judge or Magistrate* , unless ordered by a superior court vide Sec.121.

NOTE:- However, a judge or magistrate can waive the privilege and volunteer to depose.

Ex=Allegation that the deposition was recorded wrongly or improperly

No privilege to matters which comes to his knowledge in his personal capacity

- The privilege under section 121 does not apply to matters which comes to the knowledge of a **Judge or Magistrate in personal capacity as an ordinary person.** For example, if a murder takes place in the court in the presence of the Judge and Magistrate, the **fact of murder comes to his knowledge as an eye-witness present at the scene** but not as a Judge or Magistrate and he can be asked as to how it took place

Matrimonial Communications (Sec.122)

- According to Section 122 communications between husband and wife are strictly protected from disclosure. According to this provision a spouse cannot be compelled to disclose the information given by the other spouse and is also not permitted to disclose any communication between them except with the permission of the other spouse.

Legal Rules as to Matrimonial Communications :1

1. The communication must have been made during the continuance of the marriage: Any communication made either prior to the marriage or after the termination of marriage is not protected from disclosure.

Legal Rules as to Matrimonial Communications :2

2. Only communications are protected from disclosure but not the acts or conduct : This privilege is restricted only to communications between husband and wife but is not extended to acts or conduct of the husband or wife. Suppose the husband commits a murder in the presence of his wife, the wife can give evidence of what she has seen.

Legal Rules as to Matrimonial Communications :3

3. The privilege does not end after the termination of marriage :When a communication is made by one spouse to the other during the continuance of marriage, the privilege continues even after the dissolution of marriage.

Legal Rules as to Matrimonial Communications :4

4. The privilege operates only against the husband or wife but not against third persons:

A third person or a stranger is not prevented to give evidence of such communication. Suppose the husband makes a disclosure to his wife which is overheard by a neighbour, the neighbour can give evidence about such communication.

Circumstances in which disclosure of
matrimonial communication is
permissible :

1. Matrimonial communications can be given in evidence with the express consent of the spouse who made the communication.
2. In suits or criminal proceedings between the husband and wife matrimonial communications can be given in evidence.

Evidence as to affairs of State (Sec.123)

- According to Section 123 a witness cannot be permitted to give evidence regarding *unpublished official records relating to affairs of state* without the permission of the concerned Head of the Department. The reason for the privilege is that the disclosure of the contents of such documents would harm public interest. The basis for Section 123 is the maxim "regard for public welfare is the highest law".

Section 123 involves two things

- (1) That the document is an unpublished official record relating to any affairs of State, and
- (2) the officer at the head of the department concerned may give or withhold the permission for giving the evidence derived therefrom.

AFFAIRS OF STATE : Documents pertaining to public (peace and) security, national defence and foreign relations (good neighborly relations)

Ex=Hindu's disclosures (Rafale deal) Not unpublished

Documents as to affairs of State

- It is only such documents which relate to the affairs of the State *the disclosure of which would be detrimental to the public interest* that come within the category of unpublished official records relating to affairs of State and entitled to protection under this section.

The following are examples of unpublished records of State, viz.,

1. documents exchanged between two states.
2. documents exchanged between Heads of the Departments or between ministers.

Unpublished/ Affairs of State

- Published is not to mean only those documents or papers which are printed for general circulation.
- To illustrate the class of documents would include:
 1. Cabinet papers
 2. Foreign Office dispatches
 3. Papers regarding the security of the State
 4. High level inter departmental minutes

Note: Unpublished documents relating to **trading commercial or contractual activities** of the State are not ordinarily to be considered as documents relating to affairs of the State

Court to decide

- It is for the court to decide whether a document falls within the category “unpublished official records relating to any affairs of State. “ In doing so the Court can have regard to all the circumstances ***barring the inspection of the document itself.***
- ***OBTAIN CERTIFICATE FROM HEAD OF THE DEPT=Not*** unpublished official record
- Procedure in Section 124 = obtaining opinion of the officer
- ***Disclosure123= Not*** unpublished official record
- ***Disclosure124= Not or Does not harm public interest***

Preliminary enquiry(S.123)

The court can hold a preliminary enquiry and **determine the validity of the objections to its production**, and that necessarily involves an enquiry into the question as to **whether the evidence relates to an affair of the State** under this section or not. In this enquiry the **Court has to determine the character or class of the document**. In such an enquiry, the concerned head **need not show or produce the particular document but other collateral evidence can be produced which may assist the court in determining the validity of the objection** under this section. Upon such preliminary enquiry if the **Court comes to an opinion that the document does not pertain to the affairs of the State ,it may reject the claim for privilege** and may insist for the production of the document.

Disclosure of communications made in official confidence (Sec.124)

- According to Section 124, no public officer can be compelled to disclose communications made to him in official confidence, if he considers that the public interest would suffer by the disclosure. It would normally include all officers including clerks of superior officers . If a question arises whether a communication is made in official confidence or not - such question is determined by the court.

Information as to commission of offences : (Sec.125)

- According to section 125, the Magistrates, the police officers and the revenue officers shall not be compelled to disclose the source of information received by them as to the commission of any offence. The section is enacted to protect the citizens, who help the officials by giving information regarding offences. If the name of the informer is revealed, the offender may cause harm to such person.

Professional Communications (S.126)

- This privilege is confined to legal advisors and does not apply to other professionals like Doctors, Chartered Accountants etc., In other words, communications between a legal advisor and his client only are privileged. The reason for this rule is unless the client makes a free and frank disclosure of all facts, it is not possible for a lawyer to defend the case of a client in an effective manner. A client would make a free and frank disclosure only when there is a guarantee to him that what all he passes on to the lawyer would not be disclosed.

Documents as well as Advise

An Advocate is prohibited from disclosing not only the communication, but also the **advice given by him to the client as well as the contents of the documents with which he becomes acquainted in the course of his employment.** This privilege exists even after the employment ceases.

NOTE :According to S. 127, this privilege extends to the **interpreters, clerks or servants** of the advocates.

Exceptions

In the following cases an advocate may disclose the information passed to him by his client.

1. In case the client makes a communication in furtherance of an illegal purpose. (For example a client says to a lawyer "I wish to obtain possession of property by the use of a forged deed. I request you to guide me". This communication being made in furtherance of a criminal purpose is not protected from disclosure).
2. In case a lawyer finds any crime or any fraud committed after the employment began.
3. In case the client gives an express consent for the disclosure.

Example

- To *defend a person who has committed forgery* (such communication made by such person to his lawyer to the effect that he committed forgery, is protected from disclosure). If the lawyer is *consulted for fabricating a forged deed*, the communication made by client to his lawyer to the effect that he wants to obtain possession of some properties by use of forged deed, is not protected from disclosure.

OFFICIAL SECRETS ACT

- The **Official Secrets Act** was first enacted in **1923** and was retained after Independence. The law, applicable to government servants and citizens, provides the framework for dealing with espionage, sedition, and other potential threats to the integrity of the nation.
- Section 5 of OSA, deals with sharing of information that can be in the form of “any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place”. Not just sharing this information, a person can be found guilty under the Act even for retaining such information in their possession.

RTI Act & OSA which has primacy?

- Section 22 of the RTI Act provides for its primacy vis-a-vis provisions of other laws, including OSA. This gives the RTI Act an overriding effect, notwithstanding anything inconsistent with the provisions of OSA. So if there is any inconsistency in OSA with regard to furnishing of information, it will be superseded by the RTI Act. However, under Sections 8 and 9 of the RTI Act, the government can refuse information.
- Effectively, if government classifies a document as “secret” under OSA Clause 6, that document can be kept outside the ambit of the RTI Act, and the government can invoke Sections 8 or 9.

MODSI

- The Manual of Departmental Security Instruction (MODSI) of the Ministry of Defence has laid down procedures and criterion for classification of documents as '**top secret**', '**secret**' and '**confidential**'. Papers containing vital information which cannot be disclosed for reasons of national security are classified as 'top secret', and these must not be disclosed to anyone for whom they are not essential. Such papers include references to current or future military operations, intending movements or disposition of armed forces, shaping of secret methods of war, matters of high international and internal political policy.

MODSI

- **The 'secret' classification** is reserved for papers the disclosure of which could cause administrative embarrassment or difficulty, an internal breach of peace and amity, injury to the interest and prestige of the government, or would be of advantage to a foreign nation or enemy. **The 'confidential' category** is reserved for papers containing information the unauthorised disclosure of which, while not endangering national security, would be prejudicial to the interests of the nation, any government activity or individuals, or would cause administrative embarrassment or difficulty or be of an advantage to a foreign nation.

Has the law undergone any changes over the years?

- No. However, the **Second Administrative Reforms Commission (SARC) Report, 2006**, suggested that the Act should be substituted by a chapter in the National Security Act that incorporates the necessary provisions.
- The SARC report stated that “**Confidentiality became the norm and disclosure the exception,**” it said, this tendency was challenged when the **Right to Information Act** came into existence.

Has the law undergone any changes over the years?

- In 2008, during the first term of the UPA, the Group of Ministers that scrutinised the SARC report **refused to repeal the Act but suggested amendments to do away with ambiguities.**
- In 2015, the NDA government formed a high-level panel to look into the provisions of the OSA in the light of the RTI Act. **No action has been taken on the panel's report, which was submitted in 2017.**
- Rahul Gandhi was of the view that the legislation should not be used to harass journalists.

Is withholding information the only issue with the Act?

- Another contentious issue with the law is that its Section 5, which deals with potential breaches of national security, is often misinterpreted. The Section makes it a **punishable offence to share information that may help an enemy state**. The Section comes in handy for booking journalists when they publicise information that may cause embarrassment to the government or the armed forces.

Is withholding information the only issue with the Act?

- Journalist Tarakant Dwivedi alias Akela was booked for criminal trespass under the Official Secrets Act on May 17, 2011, 11 months after he wrote an article in *Mid-Day* about how sophisticated weapons bought after 26/11 were being stored in a room with a leaking roof at the Chhatrapati Shivaji Terminus in Mumbai. An RTI query later revealed that the armoury Akela visited was not a prohibited area and the Bombay High Court subsequently dismissed the case.

Is withholding information the only issue with the Act?

- Kashmir-based journalist Iftikhar Gilani was arrested in 2002 under the OSA for downloading a document from the Internet. After spending seven months in jail, he was honourably discharged by the courts.
- In a case pertaining to journalist Santanu Saikia, who wrote an article in *Financial Express* on the basis of a leaked Cabinet note, the Delhi High Court in 2009 ruled that publishing a document merely labelled as “secret” shall not render the journalist liable under the OSA.

“Stolen documents” - Rafale deal

- Remarks made by the Attorney-General in the Supreme Court on March 6, of looking into “criminal action” against those responsible for making “**stolen documents**” on the **Rafale deal** public, have brought the Official Secrets Act into focus. The colonial-era law meant for ensuring secrecy and confidentiality in governance, mostly on national security and espionage issues, has often been cited by authorities for refusing to divulge information. ***Governments have also faced criticism for misusing the law against journalists and whistleblowers.***

Rafale deal

- Prashant Bhushan said government cannot claim privilege over the documents which are already published and is in public domain.
- He said that Section 123 Indian Evidence Act only protected “unpublished documents”.
- The most recent conviction under OSA came in 2018, when a Delhi court sentenced former diplomat Madhuri Gupta, who had served at the Indian High Commission in Islamabad, to three years in jail for passing on sensitive information to the ISI.

RTI Act & OSA

- The three sections read out pertained to the RTI having an “overriding effect” over the OSA (22), even security and intelligence outfits having to disclose information on corruption and human rights (24), and the government’s duty to reveal details that are in “public interest” (8(2)).**
- Every document is not a secret and every leak is not a crime under the Official Secrets Act. Criminality lies in "intending to benefit enemy country directly or indirectly".**